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IN THE

SUPREME COURT OF THE UNITED STATES

TERM 198_*

NO. _____

JESSIE MCLEOD,

PETITIONER,

-VS-

THE STATE OF SOUTH CAROLINA,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF

THE STATE OF SOUTH CAROLINA

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QUESTION PRESENTED FOR REVIEW

WHETHER THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHERE A SINGLE RETAINED COUNSEL REPRESENTS TWO DEFENDANTS AT TRIAL IN A STATE CRIMINAL PROCEEDING AND TIMELY STATES TO THE COURT THAT A CONFLICT OF INTEREST EXISTS AND THE TRIAL COURT FAILS TO INQUIRE AS TO THE POSSIBLE CONFLICT OF INTEREST OF COUNSEL AND REFUSES TO DECLARE A MISTRIAL.

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REPORT OF OPINION BELOW

THE PER CURIAM OPINION OF THE SOUTH CAROLINA SUPREME COURT IN THIS CASE, OFFICIALLY REPORT AS STATE V. MCLEOD, _____ S.C._____, _____S.E.2D ____(1982), IS SET OUT IN APPENDIX A. DESPITE THE FACT THAT THE BRIEF OF THE PETITIONER FILED WITH THE STATE SUPREME COURT ARGUED THIS QUESTION (SEE APPENDIX B), IT IS NOT SPECIFICALLY DEALT WITH IN THE OPINION OF THE STATE SUPREME COURT.

GROUNDS FOR JURISDICTION

THE OPINION OF THE SOUTH CAROLINA SUPREME COURT WAS ENTERED ON JUNE 10, 1982. A PETITION FOR REHEARING WAS TIMELY FILED ON JUNE 20, 1982 AND WAS DENIED ON JULY 15, 1982 (SEE APPENDIX D). THIS PETITION FOR CERTIORARI WAS FILED WITHIN SIXTY (60) DAYS AFTER THE ENTRY OF THE JUDGMENT OF THE SOUTH CAROLINA SUPREME COURT. THE JURIS-

DICTION OF THIS COURT IS INVOKED UNDER 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT SIX.

IN ALL CRIMINAL PROCEEDINGS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

UNITED STATES CONSTITUTION
AMENDMENT FOURTEEN, SECTION 1.

ALL PERSONS BORN OR NATURALIZED IN THE

UNITED STATES, AND SUBJECT TO THE JURISDICTION THEREOF, ARE CITIZENS OF THE UNITED STATES AND OF THE STATE WHEREIN THEY RESIDE. NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITED STATES; NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY, OR PROPERTY, WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF THE LAWS.

STATEMENT OF THE CASE

THE PETITIONER, JESSIE MCLEOD, ALONG WITH HIS CO-DEFENDANT STANLEY HODGE, WAS INDICTED ON MARCH 2, 1981 FOR ACCESSORY AFTER THE FACT OF A FELONY, CRIMINAL CONSPIRACY AND RECEIVING STOLEN GOODS.

THE CASE CAME TO BE HEARD AT A REGULAR TERM OF THE COURT OF GENERAL SESSIONS FOR SUMTER COUNTY, SOUTH CAROLINA, ON JUNE 1, 4 AND 5, 1981, BEFORE THE HONORABLE ERNEST A. FINNEY, JR., RESIDENT JUDGE, AT SUMTER, SOUTH CAROLINA.

BOTH DEFENDANTS WERE REPRESENTED AT A TRIAL BY JURY BY THE SAME DEFENSE COUNSEL, C. C. HARNESS, III, ESQUIRE, OF SUMMERTON, SOUTH CAROLINA. AT TRIAL, BOTH DEFENDANTS TOOK THE STAND AND DENIED THEIR GUILT. THE CASE WAS SUBMITTED TO THE JURY AND JESSIE MCLEOD WAS CONVICTED ON ALL COUNTS, AND STANLEY HODGE WAS CONVICTED OF ACCESSORY AFTER THE FACT OF A FELONY AND CRIMINAL

CONSPIRACY AND FOUND NOT GUILTY ON THE CHARGE OF RECEIVING STOLEN GOODS.

JESSIE MCLEOD WAS SENTENCED TO BE CONFINED FOR ONE YEAR ON THE CHARGE OF ACCESSORY AFTER THE FACT OF A FELONY, THE SENTENCE WAS ONE YEAR'S CONFINEMENT ON THE CHARGE OF CONSPIRACY, AND THE SENTENCE WAS THREE YEAR'S CONFINEMENT ON THE CHARGE OF RECEIVING STOLEN GOODS. THESE SENTENCES WERE ALL CONCURRENT.

STANLEY HODGE WAS SENTENCED TO BE CONFINED FOR ONE YEAR ON THE CHARGE OF ACCESSORY AFTER THE FACT OF A FELONY AND THE SENTENCE WAS ONE YEAR'S CONFINEMENT ON THE CHARGE OF CONSPIRACY. THESE SENTENCES WERE CONCURRENT.

A NOTICE OF INTENT TO APPEAL WAS TIMELY FILED AND THE APPEAL WAS HEARD. THE CONVICTIONS OF THE PETITIONER WERE AFFIRMED, WITH THE EXCEPTION OF THE CONVICTION FOR ACCESSORY AFTER THE FACT OF A FELONY, WHICH

WAS REVERSED ON THE GROUNDS THAT THERE WAS INSUFFICIENT EVIDENCE TO SUBMIT THIS QUESTION TO THE JURY.

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED IN THE COURT OF FIRST INSTANCE AFTER THREE OF THE WITNESSES FOR THE STATE HAD TESTIFIED. SEE APPENDIX C, PP. 1-7. THE MOTION FOR MISTRIAL BASED UPON THE FEDERAL QUESTION WAS ALSO MADE AFTER THE STATE RESTED ITS CASE. SEE APPENDIX C, PP. 8-10. THE MOTION WAS MADE AGAIN AFTER THE JURY RETURNED THE VERDICT. SEE APPENDIX C, PP. 11-14. ALL MOTIONS WERE DENIED. BEFORE THE SOUTH CAROLINA SUPREME COURT, THE QUESTION WAS BRIEFED BUT NOT DEALT WITH IN THE OPINION OF THAT HONORABLE COURT. SEE APPENDICES A AND B.

IT IS SUBMITTED THAT THE FEDERAL QUESTION WAS TIMELY AND PROPERLY RAISED SO AS TO GIVE THIS COURT JURISDICTION TO REVIEW THE JUDGMENT ON WRIT OF CERTIORARI.

REASONS FOR THE ALLOWANCE OF THE WRIT

WHETHER THE SIXTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL IS VIOLATED WHERE A SINGLE RETAINED COUNSEL REPRESENTS TWO DEFENDANTS AT TRIAL IN A STATE CRIMINAL PROCEEDING AND TIMELY STATES TO THE COURT THAT A CONFLICT OF INTEREST EXISTS AND THE TRIAL COURT FAILS TO INQUIRE AS TO THE POSSIBLE CONFLICT OF INTEREST OF COUNSEL AND REFUSES TO DECLARE A MISTRIAL.

THIS CASE SQUARELY PRESENTS TO THE UNITED STATES SUPREME COURT THE QUESTION LEFT UNDECIDED IN HOLLOWAY V. ARKANSAS, 435 U.S. 475 (1978) AND CUYLER V. SULLIVAN, 446 U.S. 335 (1980): AT WHAT POINT IN A TRIAL MUST THE TIMELY OBJECTION TO MULTIPLE REPRESENTATION BE MADE?

BEFORE ANALYZING THIS QUESTION, THE SIMILARITIES OF THIS CASE TO HOLLOWAY AND CUYLER SHOULD BE NOTED. ALL THREE CASES, OF COURSE, INVOLVED REPRESENTATION OF MULTIPLE DEFENDANTS BY A SINGLE DEFENSE COUNSEL. IN ALL THREE CASES, THERE WAS NO INQUIRY BY THE TRIAL COURT INTO POSSIBLE CONFLICTS OF INTEREST. BOTH CUYLER AND THE IMMEDIATE

CASE INVOLVED RETAINED COUNSEL AT TRIAL AS OPPOSED TO THE APPOINTED COUNSEL IN HOLLOWAY; HOWEVER, THE COURT STATED IN CUYLER THAT THIS DISTINCTION IS IRRELEVANT. 446 U.S., AT 343. IF THE OBJECTION IN THIS CASE IS DEEMED TO BE TIMELY, THE HOLDING OF HOLLOWAY THAT "WHENEVER A TRIAL COURT IMPROPERLY REQUIRES JOINT REPRESENTATION OVER TIMELY OBJECTION REVERSAL IS AUTOMATIC" WOULD APPLY WITHOUT INQUIRY INTO WHETHER THERE WAS ACTUAL PREJUDICE. SEE HOLLOWAY, SUPRA, AT 487-491. THE ONLY FACTOR DISTINGUISHING HOLLOWAY, CUYLER AND THE IMMEDIATE CASE IS THE TIME IN WHICH THE OBJECTION TO MULTIPLE REPRESENTATION WAS NOTED BY DEFENSE COUNSEL.

IN HOLLOWAY, DEFENSE COUNSEL MOVED THE TRIAL COURT UNSUCCESSFULLY TO APPOINT SEPARATE COUNSEL FOR THE DEFENDANTS WELL IN ADVANCE OF THE TRIAL DATE. SEE HOLLOWAY, SUPRA, AT 483-487. IN CUYLER, THE ISSUE WAS NEVER RAISED AT TRIAL. SEE CUYLER, SUPRA,

AT 348. IN THE IMMEDIATE CASE, THE ISSUE WAS RAISED AFTER THE STATE HAD PRESENTED THREE WITNESSES AND WAS RENEWED PERIODICALLY THROUGHOUT THE TRIAL AT APPROPRIATE TIMES. SEE APPENDIX C.

THERE WAS ONE FACTOR PRESENT IN BOTH HOLLOWAY AND THE IMMEIDATE CASE THAT WAS NOT IN CUYLER: THE OBJECTION WAS RAISED BY DEFENSE COUNSEL AND THE COURT FAILED TO MAKE AN ADEQUATE INQUIRY. THE TRIAL JUDGE IN THIS CASE RAISED SUA SPONTE HIS "CONCERN ABOUT THE POTENTIAL CONFLICT." APPENDIX C, P. 2. INDEED, AT THE CLOSE OF THE CASE, THE COURT NOTED "I SAID THERE MAY BE A CONFLICT . . . ." APPENDIX C, P.8.

DESPITE THE POSSIBLE CONFLICT NOTED BY THE TRIAL COURT ITSELF AND THE ASSERTIONS OF A CONFLICT BY DEFENSE COUNSEL, THERE WAS NO INQUIRY INTO THE PROPRIETY OF JOINT REPRESENTATION. FOR INSTANCE, THE COURT HAD THE ALTERNATIVE OF PERSONALLY

ADVISING "EACH DEFENDANT OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, INCLUDING SEPARATE REPRESENTATION." FED. R. OF CRIM. PRO., R.44(C). WHILE THE FEDERAL RULE IS NOT MANDATED UPON THE STATES, NUMEROUS COURTS AND COMMENTATORS HAVE URGED THAT THE PRACTICE SPECIFIED IN THE RULE BE FOLLOWED BY STATE COURTS, E.G., STATE V. OLSEN, 258 N.W.2D 898 (MINN. 1977); PEOPLE V. BAFFI, 49 N.Y.2D 820, 427 N.Y.S2D 615, 616 (1980); ABRAHAM V. UNITED STATES, 549 F.2D 117 (2D CIR. 1975); UNITED STATES V. LAURINS, 568 F.2D 98 (8TH CIR. 1977). SEE ALSO ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE §3.4(6); HYMAN, JOINT REPRESENTATION OF MULTIPLE DEFENDANTS IN A CRIMINAL TRIAL: THE COURT'S HEADACHE, 5 HOFSTRA L. REV. 315, 334 (1977). INDEED, WERE THIS HONORABLE COURT TO ADOPT THE MANDATES OF THE RULE AS A CONSTITUTIONAL REQUIREMENT, THE

QUESTIONS AS TO THE NECESSARY EXTENT OF INQUIRY BY THE TRIAL COURT WOULD BE MADE CLEAR.

THE DETERMINATION OF THE EXTENT OF INQUIRY MANDATED BY HOLLOWAY IS NOT NECESSARY HERE. UNDER ANY STANDARD, THE INQUIRY WAS INSUFFICIENT. THE TRIAL COURT NOTED THE POSSIBLE CONFLICT, BUT REFUSED A MISTRIAL WITHOUT INQUIRY TO DEFENSE COUNSEL OR TO THE DEFENDANTS THEMSELVES.

AT ONE POINT, THE TRIAL COURT STATED "THAT ANY POTENTIAL CONFLICT WAS KNOWN PRIOR TO THE INSTITUTION OF THESE PROCEEDINGS AND THE SELECTION AND SWEARING OF THE JURY." APPENDIX C, P.6. THIS IS A DIRECT CONFLICT WITH THE MANDATE OF HOLLOWAY WHERE THE COURT STATED "WHEN AN UNTIMELY MOTION FOR SEPARATE COUNSEL IS MADE FOR DILATORY PURPOSES, OUR HOLDING DOES NOT IMPAIR THE TRIAL COURT'S ABILITY TO DEAL WITH COUNSEL WHO RESORT TO SUCH TACTICS." EVEN IF TRIAL COUNSEL WAS

DILATORY IT IS IMPLICIT IN THE FOREGOING STATEMENT BY MR. CHIEF JUSTICE BURGER THAT THE TRIAL COUNSEL SHOULD BEAR THE BURDEN OF SUCH QUESTIONABLE BEHAVIOR RATHER THAN THE DEFENDANTS.

THIS LEAVES THE ONLY REAL DISTINCTION BETWEEN THE IMMEDIATE CASE AND HOLLOWAY: THE ISSUE OF WHAT CONSTITUTES A TIMELY OBJECTION TO MULTIPLE REPRESENTATION? ACCORDING TO THE DISSENT OF MR. JUSTICE POWELL IN HOLLOWAY, THIS QUESTION WAS EXPRESSLY LEFT UNDECIDED. IN GLASSER V. UNITED STATES, 315 U.S. 60 (1942), THE OBJECTION TO MULTIPLE REPRESENTATION WAS MADE MID-TRIAL; HOWEVER, IT MUST BE CONCEDED THAT THE OBJECTION WAS MADE IMMEDIATELY AFTER THE APPOINTMENT. IN CUYLER, THE OBJECTION WAS NEVER LODGED. IN HOLLOWAY, THE OBJECTION WAS MADE PRETRIAL. WHILE THE OBJECTION IN THIS CASE WAS LODGED INITIALLY DURING THE PRESENTATION OF THE STATE'S CASE,

THERE CAN BE NO QUESTION THAT THE TRIAL JUDGE HAD KNOWLEDGE OF AT LEAST A POSSIBLE CONFLICT EARLY IN THE CASE AND FAILED TO INVESTIGATE THIS POSSIBILITY. THIS MAKES REVERSAL AUTOMATIC UNDER HOLLOWAY WITH NO INQUIRY AS TO WHETHER THERE WAS AN ACTUAL CONFLICT OR PREJUDICE SUFFERED. SEE BROOKS V. HOPPER, 597 F.2D 57 (5TH CIR. 1979); UNITED STATES V. MEDINA-HERRERA, 606 F.2D 770 (7TH CIR. 1979), CERT. DEN 446 U.S.964; UNITED STATES V. GEORVASSILIS, 498 F.2D 883 (6TH CIR. 1974).

THERE EXISTS NO SOUND PUBLIC POLICY REASON FOR REFUSING TO APPLY HOLLOWAY WHERE AN OBJECTION IS LODGED DURING THE EARLY PART OF A CRIMINAL TRIAL, AS OPPOSED TO PRE-TRIAL. THE PETITION FOR CERTIORARI SHOULD BE GRANTED SO THIS IMPORTANT CONSTITUTIONAL QUESTION CAN BE DECIDED.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITIONER RESPECTFULLY REQUESTS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE DECISION BELOW.

RESPECTFULLY SUBMITTED,

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